effective on the date that Nasdaq commences operations as a national securities exchange (currently scheduled to be August 1, 2006). The Commission believes that waiving the operative delay is consistent with the protection of investors and the public interest because doing so will permit non-members to continue to use ACES without interruption. Therefore, the Commission has determined to waive the 30-day operative delay and allow the proposed rule change to become operative on the date that Nasdaq commences operations as a national securities exchange.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Nasdaq–2006–014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Nasdaq–2006–014. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Nasdaq–2006–014 and should be submitted on or before August 7, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11207 Filed 7–14–06; 8:45 am]

BILLING CODE 8010–01–P

[12] For purposes only of waiving the operative delay of this proposal, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54118; File No. SR–NASD–2005–114]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to the Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investments Trusts and Direct Participation Programs

July 10, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 28, 2005, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On June 12, 2006, NASD filed amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, which replaced the original filing, NASD clarified its discussion of certain of the proposed amendments, and made other technical changes.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 2810, to address the regulation of compensation, fees, and expenses in public offerings of real estate investments trusts and direct participation programs. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

2810. Direct Participation Programs

(a) No Change.

(b) Requirements

(1) Application

No member or person associated with a member shall participate in a public offering of a direct participation program or a limited partnership rollup transaction *or, where expressly provided below, a real estate investment trust as defined in Rule 2340(c)(4) (''REIT''),* except in accordance with this paragraph (b)*, provided however, this paragraph (b) shall not apply to an initial or secondary public offering of or a secondary market transaction in a unit, depositary receipt or other interest in a direct participation program that complies with subparagraph (2)(D).*

(2) No Change.

(3) Disclosure

(A) Through (C) No Change.

(D) Prior to executing a purchase transaction in a direct participation program *or a REIT*, a member or person associated with a member shall inform the prospective participant of all pertinent facts relating to the liquidity and marketability of the program *or REIT* during the term of the investment[;]*. Included in the pertinent facts shall be information regarding whether the sponsor has offered prior programs or REITs in which disclosed in the offering materials was a date or time period at which the program or REIT might be liquidated, and whether the prior program(s) or REIT(s) in fact liquidated on or around that date or during the time period.* [provided, however, that paragraph (b) shall not apply to an initial or secondary public offering of a secondary market transaction in a unit, depositary receipt or other interest in a direct participation program which complies with subparagraph (2)(D).]

(4) Organization and Offering Expenses

(A) No member or person associated with a member shall underwrite or participate in a public offering of a

direct participation program *or REIT* if the organization and offering expenses are not fair and reasonable, taking into consideration all relevant factors.

(B) In determining the fairness and reasonableness of organization and offering expenses for purposes of subparagraph (A) hereof, the arrangements shall be presumed to be unfair and unreasonable if:

(i) The total amount of all items of compensation from whatever source*, including offering proceeds and ''trail commissions''* payable to underwriters, broker/dealers, or affiliates thereof, which are deemed to be in connection with or related to the distribution of the public offering, exceeds *an amount that equals ten percent of the gross proceeds of the offering*[currently effective compensation guidelines for direct participation programs published by the Association];[*]

(ii) Organization and offering expenses*, which include all items of compensation*, paid by a program *or REIT* in which a member or an affiliate of a member is a sponsor exceed *an amount that equals fifteen percent of the gross proceeds of the offering*[currently effective guidelines for such expenses published by the Association];[**]

(iii) No Change.

(iv) Commissions or other compensation are to be paid or awarded either directly or indirectly, to any person engaged by a potential investor for investment advice as an inducement to such advisor to advise the purchaser of interests in a particular program *or REIT*, unless such person is a registered broker/dealer or a person associated with such a broker/dealer; [or]

(v) The program *or REIT* provides for compensation of an indeterminate nature to be paid to members or persons associated with members for sales of program units *or REIT*, or for services of any kind rendered in connection with or related to the distribution thereof, including, but not necessarily limited to, the following: A percentage of the management fee, a profit sharing arrangement, brokerage commissions, and over-riding royalty interest, a net profits interest, a percentage of revenues, a reversionary interest, a working interest, a security or right to acquire a security having an indeterminate value, or other similar incentive items; [provided however, that an arrangement which provides for continuing compensation to a member or person associated with a member in connection with a public offering shall not be presumed to be unfair and unreasonable if all of the following conditions are satisfied:]

[a. the continuing compensation is to be received only after each investor in the program has received cash distributions from the program aggregating an amount equal to his cash investment plus a six percent cumulative annual return on his adjusted investment;]

[b. the continuing compensation is to be calculated as a percentage of program cash distributions;]

[c. the amount of continuing compensation does not exceed three percent for each one percentage point that the total of all compensation pursuant to subparagraph (B)(i) received at the time of the offering and at the time any installment payment is made fall below nine percent; provided, however, that in no event shall the amount of continuing compensation exceed 12 percent of program cash distributions; and]

[d. if any portion of the continuing compensation is to be derived from the limited partners' interest in the program cash distributions, the percentage of the continuing compensation shall be no greater than the percentage of program cash distributions to which limited partners are entitled at the time of the payment.]

(vi) the program or REIT charges a sales load or commission on securities that are purchased through the reinvestment of dividends, unless the registration statement registering the securities under the Securities Act of 1933 became effective prior to (the effective date of this rule amendment); or

(vii) the member has received reimbursement for due diligence expenses that are not included in a detailed and itemized invoice.

(C) The organization and offering expenses subject to the limitations in paragraph (b)(4)(B)(ii) above include the following:

(i) issuer organization and offering expenses, which include, but are not limited to: expenses, including overhead expenses, for:

a. assembling and mailing offering materials, processing subscription agreements, generating advertising and sales materials;

b. legal services provided to the sponsor or issuer;

c. salaries and non-transaction-based compensation paid to employees or agents of the sponsor or issuer for performing services for the sponsor or issuer;

d. transfer agents, escrow holders depositories, engineers and other experts, and

e. registration and qualification of securities under federal and state law, including taxes and fees and NASD fees;

(ii) underwriting compensation, which includes but is not limited to items of compensation listed in Rule 2710(c)(3) including payments:

a. to any wholesaler that is engaged in the solicitation, marketing, distribution or sales of the program or REIT securities and any employee of the wholesaler involved in the solicitation, development, maintenance and monitoring of selling agreements and relationships with broker/dealers and accounts and account holders at broker/dealers;

b. to any employee of a member and any dual employee of a member and the sponsor, issuer or other affiliate who receives transaction-based compensation unless information has been provided to NASD, with regard to a program or REIT with fewer than ten people engaged in wholesaling, from which the Corporate Financing Department can readily conclude that the payments are made as consideration for non-broker/dealer services provided to the sponsor, issuer or other affiliate; and

c. for training and education meetings, legal services provided to a member in connection with the offering and advertising and sales material generated by a member;

(iii) due diligence expenses incurred when a member affirmatively discharges its responsibilities to ensure that all material facts pertaining to a program or REIT are adequately and accurately disclosed in the offering document.

(C) through (E) Renumbered as (D) through (F)

(5) through (6) No Change.

(c) Non-Cash Compensation

(1) No Change.

(2) Restriction on Non-Cash Compensation

In connection with the sale and distribution of direct participation *program or REIT* securities, no member or person associated with a member shall directly or indirectly accept or make payments or offers of payments of any non-cash compensation, except as provided in this provision. Non-cash compensation arrangements are limited to the following:

(A) through (B) No Change.

[*A guideline for underwriting compensation of ten percent of proceeds received, plus a maximum of 0.5% for reimbursement of bona fide diligence expenses, was published in Notice to Members 82–51 (October 19, 1982).]

[**A guideline for organization and offering expenses of 15 percent proceeds received was published in Notice to Members 82–51 (October 19, 1982).]

(C) Payment or reimbursement by offerors in connection with meetings held by an offeror or by a member for the purpose of training or education of associated persons of a member, provided that:

(i) No Change.

(ii) the location is appropriate to the purpose of the meeting, which shall mean *a United States*[an] office of the offeror or the member *holding the meeting*, or a facility located in the vicinity of such office, or a *United States* regional location with respect to *meetings of associated persons who work within that region or, with respect to*[regional] meetings *with direct participation programs or REITs, a United States location at which a significant or representative asset of the program or REIT is located;*

(iii) through (iv) No Change.

(D) through (E) No Change.

(d) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD is proposing to amend Rule 2810 (the ''Rule'') to address the regulation of compensation, fees, and expenses in public offerings of direct participation programs (''DPPs'') and real estate investment trusts as defined in Rule 2340(c)(4) (''REITs'') (collectively ''Investment Programs''). Specifically, NASD's proposed rule change would address the following issues: (1) Compensation limitations and the use and allocation of offering proceeds; (2) disclosure regarding the liquidity of prior programs offered by the same sponsor; (3) sales loads on reinvested dividends; and (4) non-cash compensation provisions regarding the appropriate location for training and education meetings.

Rule 2810 governs the underwriting terms and arrangements of DPP securities. Rule 2710 governs the underwriting terms and arrangements of REITs. However, because REITs and real estate limited partnerships are competing alternative forms of investing in real estate securities with equivalent costs of distribution, NASD's Corporate Financing Department (''Department'') has applied the same underwriting and due diligence guidelines to both DPPs and REITs since the early 1980s. As discussed in more detail below, NASD proposes to amend Rule 2810 so that the Rule's compensation, disclosure and non-cash compensation provisions expressly govern REITs.

In February 2004, NASD published Notice to Members 04–07 (the ''Notice'') requesting comment on a proposed rule change and interpretive policies regarding the allocation of fees and expenses between issuers, sponsors and broker-dealers for Investment Programs in which the sponsors and broker-dealers offering such securities are affiliated. The Notice also addressed due diligence practices and disclosure in connection with Investment Programs as well as the allocation of underwriter compensation and issuer organization and offering expenses. The Notice also proposed prohibiting sales loads on reinvested dividends in Investment Programs and closed-end funds. Finally, the Notice requested comment on two non-cash compensation provisions in Rules 2710(i) and 2810(c): (1) a proposal to amend what would constitute an ''appropriate location'' for training and education meetings; and (2) the new ''equal weighting'' and ''total production'' limitations for internal sales contests.

NASD received 10 comment letters on Notice to Members 04–07 addressing the proposed rule change, which are discussed below.[4]

a. Organization and Offering Expenses

Rule 2810 currently provides three limitations on organization and offering expenses (''O & O expenses'') in Investment Programs. In the current rule, as interpreted by NASD compensation guidelines, these expenses are broken down into three categories: ''Compensation,'' ''due diligence,'' and ''issuer organization and offering expenses.'' First, compensation payable to underwriters, broker-dealers, or affiliates may not exceed 10 percent of the gross proceeds of the offering, regardless of the source from which it is derived. Second, members or independent due diligence firms currently may be reimbursed for an additional .5 percent for bona fide due diligence expenses. And third, total issuer O & O expenses for programs in which the member is affiliated with the program sponsor may not exceed 15 percent of the offering proceeds, including any compensation and due diligence expenses.[5] For offerings of programs in which the member is affiliated with the sponsor, this allows an additional 4.5 percent for issuer O & O expenses above the 10 percent underwriting compensation and .5 percent due diligence expenses.

As discussed below, the proposed rule change would make the Rule more explicit and objective in its treatment of the allocation of certain fees and expenses between issuer O & O and compensation (eliminating the current 0.5 percent limit on due diligence expenses) and modify the limitations pertaining to due diligence expenses.

i. Issuer Offering and Organization Expenses

Notice to Members 04–07 described the current methodology for allocating O & O expenses between compensation, due diligence and issuer O & O expenses and provided guidance on how the Department allocates certain expenses in the review process. Commenters generally supported the review procedures set out in the Notice, and the proposed rule change would codify the allocation methodologies described therein. Thus, issuer O & O expenses would include: (i) Expenses, including overhead expenses, for

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[4] Comments were received from Bob Cornish (Feb. 25, 2004); Mewbourne Securities, Inc. (Roe Buckley) (March 8, 2004); Wells Investment Securities, Inc. (Philip M. Taylor) (March 11, 2004); Hines Real Estate Securities, Inc. (Leslie B. Jallans) (March 11, 2004); Pacific West Financial Group (Philip A. Pizelo) (March 11, 2004); NASAA (Ralph A. Lambiase) (March 12, 2004); CNL Securities Corp. (Robert A. Bourne) (March 12, 2004); Investment Program Association (Christopher L. Davis) (March 12, 2004); Massachusetts Securities Division (Matthew J. Nestor) (March 18, 2004); and Duane Morris (Laurence S. Lese) (April 2004).

An additional 26 comment letters received in response to Notice to Members 04–07 pertain solely to NASD's proposal to rescind an NASD interpretive policy regarding trail commissions charged by commodity DPPs. This issue was resolved separately in Notice to Members 04–50, which announced rescission of this policy effective October 12, 2004. See Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealer, Inc. Relating to the Treatment of Commodity Pool Trail Commissions, 69 FR 45870 (July 30, 2004); Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Implementation Date of Notice of Members 04–50 (Treatment of Commodity Pool Trail Commissions Under Rule 2810), 69 FR 55855 (September 16, 2004).

[5] See current Rule 2810(b)(4)(B)(i) and Notice to members 82–51. This 15 percent limitation on O & O expenses applies only to sponsors that are affiliated with NASD members, while the ten percent limitation applies to all DPPs and REITS.

assembling and mailing offering materials; processing subscription agreements and generating advertising and sales materials; (ii) legal services provided to the sponsor or issuer; and (iii) salaries and non-transaction-based compensation paid to employees or agents of the sponsor or issuer for performing such services. Also included would be expenses for transfer agents, escrow holders depositories, engineers and other experts, and registration and qualification of securities under Federal and state law, including taxes and fees and NASD fees.[6]

ii. Limits on Compensation

As noted above, O & O expenses include fees for underwriting compensation. The proposed rule change would clarify that amounts deducted from the offering proceeds or amounts paid to members, underwriters or affiliates as trail commissions over time are to be treated as underwriting compensation.[7] In addition, paragraph (b)(4)(B)(i) of Rule 2810 would be amended to expressly state that all items of compensation deemed to be in connection with or related to the public offering shall not exceed ''ten percent of the gross proceeds of the offering.''[8] Accordingly, all items of compensation paid from any source, including offering proceeds, partnership assets or management fees, would be subject to a ''hard cap'' of an amount that equals ten percent of gross offering proceeds.[9]

The proposed rule change also would delete paragraphs (b)(4)(B)(v)(a) through (d) of Rule 2810 relating to continuing compensation arrangements. Members have not relied on these provisions since their adoption, and the limitations on continuing compensation are included in paragraph (b)(4)(B)(i) of Rule 2810 as proposed to be amended.

iii. Dual Employees

Prior to the publication of Notice to Members 04–07, members had urged the Department not to allocate automatically all payments (e.g., salaries, bonuses, and expense reimbursements) to registered persons as underwriting compensation because their primary or secondary job responsibilities may involve providing non-distribution related services to the sponsor. Notice to Members 04–07 proposed that any salary, bonus, or other form of compensation paid to a dual employee would be allocated to the ten percent underwriting limitation if any of the employee's compensation was contingent on or varied depending on how much money is raised or the number of securities that are sold in the public offering. Commenters generally were in favor of this standard, although several commenters suggested that with respect to smaller programs, prorating a dual employee's compensation would be preferable to the objective standard described in the Notice.

Thus Rule 2810(b)(4)(C)(ii)(b) in general would provide that if the employee of a member and any dual employee of a member and the sponsor, issuer or other affiliate who receives transaction-based compensation, then payments to the employee would be treated as underwriting compensation. With regard to smaller programs with fewer than 10 people engaged in wholesaling, the proposed Rule provides that filers can provide detailed per-employee information to the Department for review. Based on its review, the Department may conclude that certain salary or other non-transaction-based payments made to a dual employee may be allocated to issuer O & O expenses notwithstanding that fact that the dual employee also received transaction-based compensation for other services.[10] For example, after reviewing the relevant documents and information, the Department may conclude that not all of the payments to an employee who is engaged only part time in wholesaling shall be deemed compensation in connection with or related to the distribution of a public offering.

iv. Wholesaling

As described in Notice to Members 04–07, the proposed rule change would require that underwriting compensation include payments to any wholesaler that is engaged in the solicitation, marketing, distribution or sales of the Investment Program securities and any employee of the wholesaler involved in the solicitation, development, maintenance and monitoring of selling agreements and relationships with broker-dealers and accounts and account holders at broker-dealers.[11] NASD staff views wholesaling as a quintessential sales activity in connection with the distribution of Investment Programs and thus should be part of underwriting compensation.

Based on comments received, however, and as discussed above, the Rule would provide NASD with the flexibility to determine on a case-by-case basis whether payments to *dual employees* of a broker-dealer, and a sponsor, issuer or other affiliate with fewer than ten people engaged in wholesaling pertain to wholesaling activities or other, non-related activities.[12]

v. Training and Education Meetings, Legal Services, and Advertising and Sales Materials

Notice to Members 04–07 described the Department's policy to allocate to underwriting compensation fees and payments for training and education meetings, legal services provided to a broker-dealer participating in the offering, and advertising and sales material generated by a broker-dealer participating in the offering. The commenters generally supported this policy, and the proposed rule change would codify this policy.[13]

vi. Due Diligence

In Notice to Members 04–07, NASD addressed due diligence practices and disclosure in connection with Investment Programs. Specifically NASD reminded members that for purposes of the current .5 percent allowance for bona fide due diligence expenses, ''due diligence expenses'' relate only to those expenses incurred when the member affirmatively discharges its responsibilities to ensure that all material facts pertaining to a program are adequately and accurately disclosed in the offering document.[14] The following principles were outlined in the Notice:

- Any due diligence payment or reimbursement that is mischaracterized in a filing with NASD or in an offering document would be deemed to be undisclosed underwriting compensation, and the mischaracterization would violate NASD rules and the federal securities laws. Accordingly, members may include only their actual costs incurred for bona fide due diligence expenses.
- Any reimbursement that includes a profit margin to the member will be

[6] See proposed amendment to Rule 2810(b)(4)(c)(i).

[7] See proposed amendment to Rule 2810(b)(4)(B)(i).

[8] The ten percent figure currently is NASD policy and not in the text of the Rule.

[9] An alternative fifteen percent limitation on all items of compensation in which a member or an affiliate of a member is a sponsor is discussed in the text accompanying footnote 16.

[10] See proposed amendment to Rule 2810(b)(4)(C)(ii)(b). These review provisions related to smaller programs apply only to dual employees of a broker-dealer and the sponsor, issuer or other affiliate. Conversation between Joseph Price, Vice President, NASD Corporate Financing Department, and Michael Hershaft, Special Counsel, SEC, June 30, 2006.

[11] Proposed amendment to Rule 2810(b)(C)(ii)(a).

[12] Proposed amendment to Rule 2810(b)(C)(ii)(b).

[13] Proposed amendment to Rule 2810(b)(C)(ii)(c).

[14] NASD proposes to codify this requirement at 2810(b)(4)(c)(iii).

deemed to be underwriting compensation subject to the ten percent limitation, whether or not the member claims that the reimbursement was for ''due diligence expenses.''

• A sponsor may not reimburse a member for activities that are inconsistent with the due diligence objective, such as golf outings, cruises, tours, and other forms of entertainment.

• Members should expect the Department to request a copy of any due diligence meeting agenda to verify that the meeting served a bona fide due diligence purpose.

Commenters strongly supported clarification of the treatment of due diligence expenses under Rule 2810. NASD recognizes that conducting appropriate due diligence in connection with Investment Program offerings is an important part of protecting investors and satisfying members' obligations to their customers. However, NASD also is concerned that some members may have merely ''piggybacked'' on the due diligence of others and accepted reimbursements that amounted to little more than an additional fifty basis points of underwriting compensation. Accordingly, the proposed rule change would require that a member not accept any payments or reimbursements for due diligence expenses unless they are included in a detailed and itemized invoice that is presented by the member to the program sponsor or other entity that pays or reimburses due diligence expenses.[15] In addition, the proposal would eliminate the current .5 percent limit on due diligence expenses currently applicable to Rule 2810. NASD believes that the current cap may unnecessarily limit members' bona fide due diligence activities. Instead, the maximum amount of O & O expenses would remain fifteen percent of the gross offering proceeds (which amount would include: (1) Issuer O & O expenses; (2) compensation up to the maximum of ten percent of gross proceeds; and (3) due diligence expenses that are supported by a detailed and itemized invoice).[16]

b. Liquidity Disclosure

The prospectuses of Investment Programs typically establish a date or time period when an investment will become liquid: either the assets of the Investment Program will be liquidated and the proceeds distributed to shareholders, or the Program may become listed on a national securities exchange or quoted on NASDAQ. Most prospectuses also provide that the liquidity event may be delayed due to market conditions or other factors.

Rule 2810(b)(3)(D) currently provides that prior to executing a purchase transaction in a direct participation program, a member or person associated with a member shall inform the prospective participant of all pertinent facts relating to the liquidity and marketability of the program during the term of the investment. NASD is concerned that some investors do not fully appreciate that the liquidation of some sponsors' programs are frequently delayed. The proposal would amend Rule 2810(b)(3)(D) to include REITs as defined in Rule 2340(c)(4), and to require members and their associated persons to inform prospective investors whether the sponsor has offered prior programs for which the prospectus disclosed a date or time period when the program might be liquidated, and whether the prior programs in fact liquidated on or around that date or time period. Members selling Investment Programs would have to disclose whether prior programs offered by the program sponsor liquidated on or during the date or time period disclosed in the prospectuses for those programs. For example, if a sponsor has offered ten prior programs and only two of them liquidated by the date or time period set forth in the prospectus, the member would be required to disclose these facts.

NASD recognizes that delays in liquidity may be due to market conditions and other factors beyond the sponsor's control, and that in some cases, investors may benefit from delays in liquidity. Importantly, the proposed rule change would not require liquidations in the time periods specified. However, NASD believes that investors should be provided with the sponsor's track record as an additional piece of data upon which to base an investment decision.

c. Sales Loads on Reinvested Dividends

Notice to Members 04–07 requested comment on amending Rule 2810 to prohibit commissions (sales loads) on reinvested dividends in Investment Programs.[17] NASD made similar amendments in April 2000 to the Investment Company Rule (Rule 2830), which prohibits members from offering or selling shares of an investment company if it has a front-end or deferred sales charge imposed on shares purchased through the reinvestment of dividends. Three commenters supported NASD's proposal to prohibit loads on reinvested dividends in Investment Programs. One commenter suggested that the industry currently is moving in the direction of eliminating sales loads on shares purchased through dividend reinvestment programs, which reflects a desire among certain issuers and broker-dealers to allow stockholders to reinvest in companies at reduced prices. Another commenter suggested that, for most customers, the reinvestment of dividends typically does not involve a separate investment decision. This commenter also suggested that distributions in DPP investments often involve substantial returns of capital and that charging a commission for reinvesting those funds can result in double selling compensation. The third commenter suggested that a sales load on reinvested dividends is another means to increase overall sales commissions and that investors generally perceive dividend reinvestment plans as transactions without expenses.

Three commenters opposed prohibiting sales loads on reinvested dividends because members provide more ongoing services in connection with DPP and REIT dividend reinvestment programs than with mutual fund dividend reinvestment programs. One commenter noted that registered representatives involved in dividend reinvestment plans of DPP and REIT programs usually continue to monitor their client's financial portfolios and perform valuable services for their clients on an ongoing basis. The commenter suggested that when a registered representative determines that a specific investor has reached an adequate level of real estate diversification in his/her portfolio, the financial planner would advise the investor to discontinue further investments in the applicable dividend reinvestment plan.

One commenter also stated that due to limited liquidity opportunities, registered representatives who place their clients in DPP and REIT programs must also monitor the program portfolio (in addition to their clients' portfolios) more closely than their counterparts who place their clients in liquid investments such as mutual funds. This commenter noted that in order to properly advise a client on whether to make an additional investment in REITs

[15] See proposed amendment to Rule 2810(b)(4)(B)(vii).

[16] See proposed amendment to Rule 2810(b)(4)(B)(ii).

[17] Notice to Members 04–07 also requested comment on prohibiting sales loads on reinvested dividends for closed-end funds. No commenters addressed this proposal. NASD does not propose amending rule 2710 to address closed-end funds in this filing, which is limited to regulatory proposals involving DPPs and REITs. NASD will further consider whether it is appropriate to adopt amendments prohibiting sales loads on reinvested dividends for closed-end funds.

and DPPs, whether through a dividend reinvestment program or otherwise, or whether to apply for participation in a redemption program, the registered representative must continually review and analyze the properties in the investment portfolio, prevailing market conditions, and the management of the portfolio by the sponsor. The commenter stated that registered representatives should be compensated for this ongoing review and analysis because they are providing a valuable service to their clients. The commenter also noted that, without such compensation, the registered representatives might not be as motivated to do this work, which is in the interests of their clients.

NASD has determined to move forward with its proposal to prohibit loads on reinvested dividends for Investment Programs after the effective date of this rule amendment.[18] In response to commenters who believe loads on reinvested dividends are necessary in order to compensate registered representatives for providing ongoing services for Investment Programs, NASD notes that Rule 2810 allows for the receipt of trail commissions (up to the limits on underwriting compensation) to compensate them for such ongoing services.[19]

NASD does not believe that sales loads on reinvested dividends are necessary or should be used to finance monitoring of client positions and client communication. Since many dividends in Investment Programs include a return of principal invested, allowing a sales load on reinvested dividends would amount to a double charge to the investor in the NASD's view. In addition, NASD believes that many investors may be confused about what sales loads on reinvested dividends are and why they are paying them, since they may not view the reinvestment of dividends as a separate investment decision for which a sales charge would be levied.

d. Non-Cash Compensation Provisions

i. Location of Training and Education Meetings

The non-cash compensation provisions of Rule 2810 currently permit payments and reimbursements by an offeror in connection with training and education meetings, if the meetings meet the conditions of the Rule. One of the current conditions is the requirement that:

''The location is appropriate to the purpose of the meeting, which shall mean an office of the issuer or affiliate thereof, the office of the member, or a facility located in the vicinity of such office, or a regional location with respect to regional meetings.'' [20]

The proposed rule change would amend the Rule to provide that an ''appropriate location'' for a training and education meeting may include a location at which a significant or representative Investment Program asset is located. The proposed rule change would address the fact that an important part of bona fide training and education meetings for Investment Programs may be inspecting real estate, oil and gas production facilities, and other types of assets that will be held and managed by the program.[21]

This amendment was proposed in Notice to Members 04–07, and the commenters generally supported this proposed rule change. Commenters agreed that an important part of bona fide training and education meetings is inspecting real estate, oil and gas production facilities, and other types of assets held and managed by the program. Two commenters noted that it is especially important for associated persons to visit an issuer's assets to better understand the business of the issuer when selling non-liquid investments to customers whose money may be locked up for significant time periods. The commenters did not believe that it would be difficult to determine whether an asset is ''significant'' to a program and did not think that this determination would complicate the ability of a member's legal or compliance staff to decide whether associated persons should attend a particular meeting.

Two commenters to Notice to Members 04–07 suggested that NASD issue a comment indicating that significance might vary from program to program and may be determined based on various criteria in addition to the size of the asset. The commenters noted that an asset may be significant because it reflects a new segment or asset class in which an issuer has determined to invest or because it is representative of a geographic focus of the issuer. The commenters also suggested that the proposed rule language should be broadened to include ''a location at which a significant or representative asset of the program is located.'' This addition would allow associated persons to visit program assets in conjunction with training and education meetings even if a program's assets are of approximately the same size or type or are located in one geographic area. The commenters noted that associated persons still have a great interest in visiting assets of a program that consists of similar assets.

Three commenters to Notice to Members 04–07 stated that they do not believe that the proposed amendments relating to the location of training and education meetings would create a significant risk that locations would be chosen to provide incentives and awards for selling products. Two commenters noted that the non-cash compensation provisions of Rule 2810 provide that training and education meetings may not be conditioned on meeting sales thresholds and may not include payments for expenses of guests. The commenters stated that the industry is aware that agendas must address training and education activities and should not include extracurricular activities such as golf outings.

Based on the foregoing, NASD is proposing to amend Rule 2810 to provide that a training and education meeting may include a location at which a ''significant or representative'' asset is located.[22]

ii. Total Production and Equal Weighting Requirements

In Notice to Members 04–07, NASD proposed to amend Rule 2810 to incorporate the total production and equal weighting conditions for internal sales contests in the Investment Company Rule (Rule 2820) and the Variable Contracts Rule (Rule 2830) into Rule 2810. Subsequently, in June 2005, NASD published Notice to Members 05–40 proposing to expand the prohibitions on non-cash compensation to the sale and distribution of any security, not just the securities of DPPs, REITs, investment companies and variable insurance contracts. NASD staff will

[18] See proposed amendments to Rule 2810(b)(4)(B)(vi).

[19] See proposed amendments to Rule 2810(b)(4)(B)(i).

[20] See proposed amendments to Rule 2810(b)(2)(c)(ii). NASD interprets the clause ''regional location with respect to regional meetings'' in the Rules to permit regional meetings held for the convenience of regional broker-dealers and their associated persons, not national meetings held in regional locations.

[21] As discussed above, NASD proposes to amend Rule 2810 so that the Rule's compensation, disclosure and non-cash compensation provisions expressly govern illiquid REITs (*i.e.*, REITs as defined in Rule 2340(c)(4)). The proposed rule change would not amend the non-cash compensation provisions in Rule 2710, which currently are identical to those in Rule 2810. Accordingly, the non-cash compensation provisions regarding the location of training and education meetings will be different for exchange-traded REITs under Rule 2710 and illiquid REITs under Rule 2810.

[22] See proposed amendment to Rule 2810(c)(2)(C)(ii).

consider whether any additional amendments are necessary to the non-cash compensation provisions of Rule 2810 in the context of that rulemaking initiative.

e. Effective Date of the Proposed Rule Change

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Specifically, NASD believes that the proposed rule change amends Rule 2810 to provide greater clarity regarding limitations on compensation, fees, and expenses in public offerings of REITs and DPPs.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published for comment in NASD Notice to Members 04–07 (February 2004). Ten comments were received in response to the Notice.[23] All of the comment letters received were generally in favor of the proposed rule change, and are further discussed in Item II of this notice.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2005–114. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR–NASD–2005–114 and should be submitted on or before August 7, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11208 Filed 7–14–06; 8:45 am]

BILLING CODE 8010–01–P

[23] See note 1, supra.

[24] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10519 and # 10520]

New York Disaster # NY–00022

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of New York (FEMA–1650–DR), dated 7/03/2006.

Incident: Severe Storms and Flooding.

Incident Period: 6/26/2006 and continuing.

Effective Date: 7/3/2006.

Physical Loan Application Deadline Date: 9/1/2006.

Economic Injury (EIDL) Loan Application Deadline Date: 4/3/2007.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 7/3/2006, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans):

Broome, Chenango, Delaware, Herkimer, Montgomery, Oneida, Orange, Otsego, Schoharie, Sullivan, Tioga, Ulster.

Contiguous Counties (Economic Injury Loans Only):

New York: Albany, Chemung, Columbia, Cortland, Dutchess, Fulton, Greene, Hamilton, Lewis, Madison, Oswego, Putnam, Rockland, Saratoga, Schenectady, St. Lawrence, Tompkins.

New Jersey: Passaic, Sussex.